BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENISE R. GARRETT Claimant VS. **LAWRENCE HELPERS, INC.** Respondent AND **ACUITY MUTUAL INSURANCE CO.** Insurance Carrier	)	Docket No. 1,045,439

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 10, 2009, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. George H. Pearson, of Topeka, Kansas, appeared for claimant. Joseph C. McMillan, of Lenexa, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of her employment with respondent and ordered respondent to pay claimant temporary total disability compensation and provide her with medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 9, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.[1]

[1] Respondent's brief refers to a deposition of claimant taken July 8, 2009. That discovery deposition is not part of the record on appeal.

ISSUES

Respondent requests review of the ALJ's finding that claimant suffered a compensable accidental injury that arose out of and in the course of her employment. Respondent further contends that the ALJ exceeded his jurisdiction in finding that medical and temporary total disability benefits were due and owing. Respondent also asserts that the ALJ's finding as to claimant's average weekly wage was in error and not based on the evidence.

Claimant argues that respondent's issues concerning medical and temporary total disability benefits and average weekly wage are not appealable from a preliminary hearing order. Claimant requests the Board affirm the ALJ's finding that she suffered a compensable accident that arose out of and in the course of her employment with respondent.

The issues for the Board's review in this appeal are:

(1) Did claimant suffer personal injury by an accident that arose out of and in the course of her employment with respondent?

(2) Does the Board have jurisdiction over the issue of whether the ALJ exceeded his jurisdiction in ordering medical benefits and temporary total disability benefits? If so, are medical benefits and temporary total disability benefits due and owing to claimant as a result of the work-related accident?

(3) Does the Board have jurisdiction over the issue of whether the ALJ erred in calculating the claimant's average weekly wage? If so, what is claimant's average weekly wage?

FINDINGS OF FACT

Claimant began working for respondent in October 2007 as a caretaker aide helping elderly with their everyday routines. She was hired as a full-time employee and worked 40 hours per week making $10 per hour. She worked 36 hours over the weekend from 8 p.m. to 8 a.m. on Friday, Saturday and Sunday and worked 4 hours during the week, as well as from 5 to 10 hours per week overtime. Claimant also worked full time at Hallmark Cards as a fold card operator.

On May 2, 2008, claimant was helping a client to the restroom when he lost his balance and fell. Claimant tried to grab the client, but she also fell, injuring her low back and neck. She reported the injury to a coworker that same day and to respondent's owner, Julia Hines, the next day. Claimant testified that Ms. Hines told her to take some time off work and rest. Claimant met with Ms. Hines in person on May 5, 2008, and Ms. Hines told her she should see a doctor or chiropractor and to have claimant's personal insurance

cover the cost of the treatment. Ms. Hines told her that she would pay any costs that her personal insurance did not cover. Claimant testified she believed her job would be in jeopardy if she did not follow Ms. Hines suggestions. She also testified that Ms. Hines told her that she did not want to file a workers compensation claim. Respondent, however, did report the workers compensation claim to its insurance carrier on May 28, 2008, and a recorded statement was taken from claimant by the insurance carrier on May 29, 2008.

Claimant had a previous low back injury when she slipped and fell while working for NCS. As a result, she had a laminectomy at L4-5 and L5-S1 in 2004 performed by Dr. Chris Wilson. She was released from treatment by Dr. Wilson with no restrictions. A workers compensation claim was filed, and the claim was settled. Although in her recorded statement claimant stated that she was not at 100 percent after her previous surgery, at the preliminary hearing she testified that she had no problems with her back following the 2004 surgery.

Claimant sought treatment from Dr. Jeffrey Schroeder, a chiropractor, beginning May 6, 2008. Dr. Schroeder referred her to Dr. Norman Waitley, whom she saw from May 21, 2008, through March 30, 2009. Dr. Waitley's records indicate that claimant said she had intermittent pain since 2005 because of a fall, and he suggested that her low back pain might be related to her previous laminectomy. Although there is no mention of a fall on May 2, 2008, in Dr. Waitley's records, claimant testified that was because she was continuing to follow Ms. Hines' directive to claim this under her personal health insurance rather than as a workers compensation claim. She has been referred by Dr. Waitley to Dr. Harold Hess, a neurosurgeon, who has recommended that she have lumbar spine surgery.

Claimant testified that after her fall on May 2, 2008, she continued to work for respondent until July 2008, when she was terminated. However, she took an unpaid leave of absence from her job at Hallmark from May to July 2008 because of her back condition. From July 2008 until February 2009, claimant worked her job at Hallmark, which required her to repetitively bend and stoop, as well as lift from 40 to 50 pounds. In February 2009, claimant was given restrictions by Dr. Waitley of no lifting over 10 pounds, no bending, no twisting, and no continuous standing. Hallmark was unable to accommodate her restrictions, and claimant has been off work since February 11, 2009. She requested FMLA certification, and Dr. Waitley filled out the paperwork, in which he diagnosed claimant as having post-laminectomy syndrome.

PRINCIPLES OF LAW AND ANALYSIS

(1) Did claimant suffer personal injury by an accident that arose out of and in the course of her employment with respondent?

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[5] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[6] An injury is not compensable, however, where the worsening

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[2] K.S.A. 2008 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[4] *Id.* at 278.

[5] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[6] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[7]

Claimant's testimony that she was injured in an accident that occurred on May 2, 2008, while assisting a client to the restroom is uncontradicted. The only witness to that incident, the client, did not testify. Likewise, claimant's testimony that she reported the accident to her supervisor, Julie Hines, the next day and was later instructed not to file a workers compensation claim but instead to obtain treatment on her own through her personal health insurance is uncontradicted. Ms. Hines did not testify. Claimant testified that she followed Ms. Hines' instructions and sought treatment on her own using her personal health insurance and that this is why she did not give the treating physicians a history of her injury resulting from the work-related accident of May 2, 2008.

The record does not contain a causation opinion from a medical expert relating claimant's current condition and need for treatment to her May 2, 2008, accident. However, such an opinion from an expert is not required. An injured worker is competent to express an opinion concerning her physical condition.[8]

The ALJ apparently found claimant to be a credible witness because he awarded benefits based upon her testimony. This Board Member agrees with the ALJ's conclusion that the record compiled to date satisfies claimant's burden to prove she suffered personal injury by accident on May 2, 2008, which arose out of and in the course of her employment with respondent.

(2) Does the Board have jurisdiction over the issue of whether the ALJ exceeded his jurisdiction in ordering medical benefits and temporary total disability benefits? If so, are medical benefits and temporary total disability benefits due and owing to claimant as a result of the work-related accident?

(3) Does the Board have jurisdiction over the issue of whether the ALJ erred in calculating the claimant's average weekly wage? If so, what is claimant's average weekly wage?

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[9] This includes review of the

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[7] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[8] See *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995), *rev. denied* 259 Kan. 927 (1996).

[9] K.S.A. 2008 Supp. 44-551.

preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[10]

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[11]

An ALJ has the jurisdiction and authority to grant medical benefits and temporary total disability benefits at a preliminary hearing. Accordingly, the Board does not have jurisdiction to address these issues at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[12] Accordingly, respondent and carrier's appeal of these issues is dismissed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

CONCLUSION

(1) Claimant met with personal injury by accident arising out of and in the course of her employment as alleged.

(2) and (3) On an appeal from a preliminary hearing order, the Board is without jurisdiction to consider the issues concerning claimant's entitlement to temporary total disability compensation and the ALJ's determination of claimant's preinjury average weekly wage.

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[10] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[11] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[12] *See State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[13] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[14] K.S.A. 2008 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Compensation of Administrative Law Judge Brad E. Avery dated July 10, 2009, is affirmed as to issue number one, and respondent's appeal as to issues numbers two and three is dismissed. The ALJ's order remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of October, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Joseph C. McMillan, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge